STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2007
v	No. 266170 St. Joseph Circuit Court
JEFFERY TODD BARNES, Defendant-Appellant.	LC No. 03-011781-FC

Before: Kelly, P.J. and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b) (relationship), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b) (relationship). The trial court sentenced defendant as a habitual offender, second offense, MCL 769.10, to life in prison. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant first claims that the trial court erred in denying his post-trial motion to dismiss based on an alleged violation of the 180-day rule. We review a trial court's decision on a motion to dismiss for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The 180-day rule, set forth in MCL 780.131(1), does not require that the defendant's trial commence within the 180-day period. *People v Bradshaw*, 163 Mich App 500, 505; 415 NW2d 259 (1987). Rather, the prosecution is required to take good faith action during the 180-day period, and promptly proceed in readying the case for trial. *Id.* at 505. If the prosecution takes such good faith action, the trial court will not lose jurisdiction over the defendant unless the initial action is followed by inexcusable delay demonstrating an intent not to bring the case to trial promptly. *Id.*

The prosecution made a good faith effort to bring defendant to trial within the 180-day period. Defendant's trial was set to commence on November 11, 2003, and the prosecution was ready to try defendant. Nonetheless, defendant requested that he be tried in December 2003, so that defense counsel could obtain records from the Family Independence Agency (FIA), which counsel believed were necessary to finalize defendant's witness list. A trial date was set for

December 10, 2003. Defendant's trial did not commence, however, until April 27, 2004. The trial court, in denying defendant's motion to dismiss, held that defendant was at fault for the several-month delay in the commencement of his trial. Such a finding was not clearly erroneous. *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998). By April 8, 2004, defendant had still not received the FIA records, and he therefore moved the trial court for an order requiring the FIA to provide him with the records. Before this, the prosecution had attempted to help defendant obtain the FIA records. Approximately two weeks later, on April 21, 2004, defendant finally filed his witness list. Because the delay in bringing defendant to trial was not an inexcusable delay attributable to the prosecution that evidenced an intent not to promptly bring defendant to trial, there was no violation of the 180-day rule. *Bradshaw, supra* at 505. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to dismiss. *Adams, supra* at 132.

Defendant also argues that the delay in him being brought to trial violated his right to a speedy trial. To preserve a speedy trial issue for appellate review, the defendant must make a formal demand on the record. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Because defendant never made a formal demand on the record for a speedy trial, defendant's claim that he was denied his right to a speedy trial is unpreserved. We review an unpreserved claim of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The federal and state constitutions guarantee a criminal defendant a speedy trial without reference to a fixed number of days. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). In determining whether a defendant was denied his right to a speedy trial, a court must balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). The fourth element, prejudice, is critical to the analysis. *Cain, supra* at 112. If the delay is 18 months or more, prejudice is presumed and the prosecutor has the burden to rebut the presumption. *Id.* If the delay is less than 18 months, a defendant is required to prove that he suffered prejudice. *Id.* Because the delay in bringing defendant to trial was less than 18 months, defendant must prove that was prejudiced by the delay.

Defendant asserts that he was prejudiced in two ways: (1) he had untried charges hanging over his head; and (2) the delay harmed his defense. Defendant's assertions are without merit. Anxiety alone is insufficient to establish a violation of the right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Further, rather than harming the defense, the delay benefited the defense. The delay produced two witnesses who testified that the victim had previously denied that defendant sexually abused her. Because defendant has failed to demonstrate that he was prejudiced by the delay, he has failed to establish that his right to speedy trial was violated. *McLaughlin, supra* at 635.

Defendant next claims on appeal that two of his convictions for first-degree criminal sexual conduct, which were based on acts of fellatio, are not supported by sufficient evidence. According to defendant, there was insufficient evidence of penetration. In reviewing the sufficiency of the evidence to sustain a conviction, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found

that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

An essential element of first-degree criminal sexual conduct is sexual penetration. *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(p). Fellatio requires entry of a penis into another person's mouth. *People v Reid*, 233 Mich App 457, 480; 592 NW2d 767 (1999). It does not consist merely of any oral contact with the male genitals. *Id.* The victim testified that she performed oral sex on defendant and that her performing oral sex on defendant included her lips or tongue touching his penis. With this testimony, the victim implicitly distinguished between sexual contact and "oral sex." Viewing the testimony in the light most favorable to the prosecution, a rational trier of fact could have inferred that defendant's penis entered the victim's mouth. MCL 750.520a(p); *Hunter, supra* at 6. Defendant's convictions are therefore supported by sufficient evidence.

Defendant argues that if we vacate his two convictions for first-degree criminal sexual conduct, which were based on acts of fellatio, he is entitled to be resentenced because those convictions affected the trial court's scoring of offense variable (OV) 11, MCL 777.41. Even though we affirm defendant's convictions, it is clear that the trial court erred in scoring OV 11. Fifty points may be scored for OV 11 if "[t]wo or more sexual penetrations occurred." MCL 777.41(1)(a). In scoring OV 11, a trial court may not count the sexual penetration that formed the basis for the conviction when that offense is itself "the sentencing offense." MCL 777.41(2)(c); *McLaughlin, supra* at 676; *People v Mutchie*, 251 Mich App 273, 280-281; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003). All other sexual penetrations, which "aris[e] out of the sentencing offense" may be counted, regardless of whether they resulted in a separate conviction. *Mutchie, supra* at 281. The phrase "arising out of" suggests "a causal connection between two events of a sort that is more than incidental." *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006). "Something that 'aris[es] out of,' or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisin." *Id.*

In this case, the sentencing offense would be one of defendant's convictions for first-degree criminal sexual conduct. *Mutchie, supra* at 280-281. For 50 points to be scored for OV 11, there must have been two or more additional sexual penetrations that arose out of the sentencing offense. *Johnson, supra* at 101. While the victim testified that defendant engaged in sexual activity with her "maybe once a day, sometimes more, sometimes not at all," there is no evidence that two or more sexual penetrations, whether they be the basis for defendant's three remaining convictions of criminal sexual conduct or uncharged offenses, arose, sprung, or resulted from the sentencing offense. Thus, the trial court erred in scoring OV 11. Because the trial court sentenced defendant based on inaccurately scored guidelines, defendant is entitled to be resentenced. See *People v Francisco*, 474 Mich 82, 89, 91-92; 711 NW2d 44 (2006).

We, therefore, need not address defendant's argument that the trial court, when it departed from the recommended minimum sentence range under the legislative guidelines, improperly considered his refusal to admit guilt and lack of remorse. In addition, we need not address defendant's argument that remand is necessary for the correction of the judgment of

sentence because it failed to reflect the actual sentenced imposed by the trial court at the initial sentencing hearing for his conviction of second-degree criminal sexual conduct.

Defendant makes several claims of ineffective assistance of counsel. To preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or for a *Ginther*[1] hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Following trial, defendant moved for a new trial. Thus, the claims of ineffective assistance raised by defendant in his motion for a new trial are preserved. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Nonetheless, because the trial court did not hold an evidentiary hearing, this Court's review is limited to the facts on the record. *Id.* In addition, not all of the ineffective assistance claims raised on appeal were raised by defendant in his motion for a new trial. Our review of those claims is also limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

"To establish ineffective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, [he] was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must overcome a strong presumption that his counsel's assistance constituted sound trial strategy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Defendant first asserts that was counsel was ineffective for failing to move to suppress his post-arrest statement. According to defendant, counsel should have moved to suppress his statement because it was obtained after he asserted his right to remain silent and because it was fruit of the poisonous tree as it was obtained after he was confronted with a pornographic magazine that was illegally seized from his motel room. The record does not support either of defendant's assertions.

A prosecutor may not use a custodial statement as evidence against a defendant unless the defendant, prior to being questioned, was warned of his *Miranda*[2] rights. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). If the defendant indicates at any time that he wishes to invoke his right to remain silent, the police must cease their interrogation. *Michigan v Mosley*, 423 US 96, 100-101; 96 S Ct 321; 46 L Ed 2d 313 (1975). The police may, however, resume questioning of the defendant if they first "scrupulously honored" the defendant's right to cut off questioning. *Id.* Police fail to "scrupulously honor" a defendant's right to cut off questioning when they refuse to discontinue the interrogation or persist in repeated efforts to wear down the defendant's resistance. *People v Slocum (On Remand)*, 219 Mich App 695, 699-700; 558 NW2d 4 (1996). A defendant must unequivocally assert his right to remain silent. *People v Adams*, 245 Mich App 226, 233-234; 627 NW2d 623 (2001).

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[1] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

We agree with defendant that he unequivocally asserted his right to remain silent. However, according to the record, this was not a case where, after defendant asserted his right to remain silent, the interrogating officer failed to scrupulously honor defendant's right to cut off questioning. After defendant asserted his right to remain silent, he initiated further conversation. Defendant informed the officer that he did not believe the victim's allegations. Because this was not a case where the interrogating officer failed to scrupulously honor defendant's right to cut off questioning, defendant's post-arrest statement was not obtained in violation of his *Miranda* rights. Accordingly, a motion to suppress defendant's post-arrest statement on the basis that it was obtained in violation of his *Miranda* rights would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Next, when the police, pursuant to a search warrant, searched defendant's motel room, they discovered and seized a Hustler videotape and magazine both entitled "Barely Legal." The trial court suppressed the videotape and magazine on the basis that they exceeded the scope of the search warrant. Defendant argues that, because he was confronted with the "Barely Legal" magazine before he made his post-arrest statement, his statement was fruit of the poisonous tree and counsel was ineffective for failing to move to suppress defendant's post-arrest statement. However, the record provides no indication that defendant was ever confronted with the "Barely Legal" magazine. Thus, because defendant has failed to establish the factual predicate of his claim for ineffective assistance of counsel, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), defendant has failed to establish that counsel's failure to move to suppress his post-arrest statement on the basis that it was fruit of the poisonous tree fell below an objective standard of reasonableness. *Mack, supra* at 129.

Defendant next argues that counsel was ineffective for failing to object or to move for a mistrial when the prosecutor, in his opening argument and examination of a police officer, improperly used the evidence of the magazine and videotape. While the trial court suppressed the "Barely Legal" videotape and magazine themselves, it ruled that the victim could testify about them. It also allowed the police officers to testify about the videotape and magazine in order to corroborate the victim's testimony. In his opening statement, however, the prosecutor informed the jury that the victim would testify that defendant would show her the "Barely Legal" videotape and magazine and that the officer who searched defendant's motel room would testify that he discovered a "Barely Legal" videotape and magazine in defendant's hotel room. We conclude that any objection to the prosecutor's opening statement would have been futile. It comported with the trial court's order. Counsel is not ineffective for failing to make a futile objection. *Fike*, *supra* at 182.

Additionally, during trial, the prosecutor solicited testimony from the police officer who discovered the "Barely Legal" videotape and magazine that the covers of each depicted males and females, who looked like children, in sexual situations. Assuming that the police officer's testimony went beyond corroborating the victim's testimony, and thus violated the trial court's order, there was sound trial strategy for counsel not to object to the officer's testimony. Our Supreme Court has recognized that "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Counsel may have decided not to object to avoid drawing unwanted attention to the details of the pornographic materials found in defendant's hotel room. Defendant has failed to

overcome the presumption that counsel's failure to object to the police officer's testimony was sound trial strategy. *Sabin, supra* at 659.

In addition, and continuing to assume that the police officer's testimony went beyond corroborating the victim's testimony, defendant has not shown that a motion for a mistrial would have been granted. A trial court should only grant a mistrial where the error complained of is so egregious that the prejudicial effect can be removed in no other way. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Because juries are presumed to follow their instructions, jury instructions are presumed to cure most errors. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). Accordingly, we must presume, and defendant has not convinced us otherwise, that a jury instruction would have cured any prejudice defendant suffered from the police officer's testimony. Defense counsel is not ineffective for failing to make a futile motion, *Fike, supra* at 182, and defendant has not shown that a motion for a mistrial would not have been futile. Thus, defendant has failed to establish that counsel's failure to move for a mistrial fell below an objective standard of reasonableness. *Mack, supra* at 129.

Defendant next asserts that counsel was ineffective when she failed to object to testimony by the prosecution's expert, Dr. Jim Henry, which went beyond the scope of expert testimony as allowed by *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995). In *Peterson*, Our Supreme Court defined the scope of testimony that may be given by a child abuse victim expert:

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Id.* at 352-353.]

Our Supreme Court also provided that an expert may not testify that the sexual abuse occurred, may not vouch for the veracity of the victim, and may not testify whether the defendant is guilty. *Id.* at 352.

We have reviewed Dr. Henry's testimony and conclude that all of his testimony was proper under *Peterson, supra*, with one exception. Dr. Henry testified that, if the victim did not testify or if she testified that the sexual abuse never occurred, neither action would invalidate her earlier disclosure of the sexual abuse. Because the victim did testify and she testified that defendant sexually abused her, the specific behaviors of her not testifying or of her denying the sexual abuse at trial were not at issue. Accordingly, Henry was prohibited from testifying that such behavior was consistent with that of other victims of child sexual abuse. *Peterson, supra* at 373-374. Nevertheless, we cannot conclude that, but for counsel's failure to object to this improper testimony, there was a reasonable probability that the outcome of defendant's trial would have been different. *Carbin, supra* at 600. Dr. Henry's testimony about the import of the victim's failure to testify or testify about the sexual abuse was irrelevant. The victim actually testified that defendant sexually abused her. She further testified that she did not tell anybody until she told her therapist because her therapist was the only person she trusted. The victim's testimony about when she disclosed the sexual abuse coincided with Dr. Henry's testimony regarding the specific behaviors of child sexual abuse victims.

Defendant also asserts that counsel was ineffective when she elicited damaging testimony from Dr. Henry on cross-examination. Decisions regarding the questioning of witnesses are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We will not substitute our judgment for that of counsel's, *id.*, nor will we assess counsel's competence with the benefit of hindsight, *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The fact that a chosen strategy may not have worked does not constitute ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Accordingly, simply because defendant did not like the answers Henry gave in response to counsel's questions on cross-examination does not mean counsel's cross-examination fell below an objective standard of reasonableness. *Mack, supra* at 129. Defendant has failed to establish his claim for ineffective assistance of counsel.

Defendant next asserts that his counsel was ineffective for failing to object when the victim's first therapist testified that the victim was not initially honest with respect to her treatment, but thereafter was honest. Defendant argues that this testimony impermissibly vouched for the victim's credibility. We disagree. Because credibility is an issue for the trier of fact, it is improper for a witness to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, the therapist was not commenting on the victim's credibility as a witness or a victim. And, even if we considered the testimony to constitute improper vouching for which an objection should have been made, counsel may have deemed it wise not to object in order to avoid bringing unwanted attention to the improper comment. *Bahoda, supra* at 287 n 54. Defendant has failed to overcome the presumption that counsel's failure to object to the therapist's testimony was sound trial strategy. *Sabin, supra* at 659.

Defendant additionally argues that his counsel was ineffective for failing to object when the prosecutor sought expert testimony from the victim's second therapist and from the victim's FIA caseworkers. First, we disagree that the second therapist's testimony was expert testimony. She merely gave a narrative of what occurred in her sessions with the victim. Nothing in her testimony was an opinion that required "scientific, technical, or other specialized knowledge." MRE 702. Accordingly, any objection would have been futile. Counsel is not ineffective for failing to make a futile objection. *Fike, supra* at 182. Second, assuming that the testimony of the caseworkers was expert testimony, there was sound trial strategy for counsel not to object. If counsel objected and the trial court had declared them expert witnesses, the credibility of the caseworkers may have been heightened in the eyes of the jury. Defendant has failed to overcome the presumption that counsel's failure to object was sound trial strategy. *Sabin, supra* at 659.

Defendant further asserts that his counsel was ineffective for failing to object to the admission of the victim's hearsay statements, which were testified to by her two therapists and Dr. Henry. We agree with defendant that the victim's statements did not constitute nonhearsay pursuant to MRE 801(d)(1)(B). There was no charge, express or implied, that a motive for the victim to falsify her testimony arose between the time she made her statements to her two therapists and Dr. Henry or when she testified at trial. *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000). However, even if the victim's hearsay statements were not admissible under another hearsay exception, defendant has failed to establish that, but for counsel's failure to object, the result of his trial would have been different. *Carbin, supra* at 600. The victim

testified that defendant performed oral sex on her, that she performed oral sex on him, and that defendant touched her private areas. She further testified that she used drugs "non-stop" so that the sexual abuse would not seem so real. The victim's behavior, in using drugs and in denying the sexual abuse, corresponded to Dr. Henry's testimony regarding the behavior of victims of child abuse. The testimony at issue was cumulative. Therefore, we cannot conclude that, but for counsel's failure to object, the result of the trial would have been different. *Carbin, supra.* Defendant has failed to establish his claim for ineffective assistance of counsel.

Defendant next asserts that counsel was ineffective for failing to consult with and call an expert witness to refute Dr. Henry's testimony. The failure to investigate and call a witness does not amount to ineffective assistance of counsel unless the defendant shows prejudice as a result. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990). Counsel's failure to call an expert witness only constitutes ineffective assistance of counsel if it deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (opinion by Cooper, J.); *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record before us supports that counsel did not attempt to secure an expert witness. However, the record does not support that, if counsel attempted to consult with expert witnesses, she would have located one to refute Dr. Henry's testimony. The record also contains no information regarding the proposed testimony of such an expert witness. Accordingly, defendant has failed to establish that counsel's failure to consult with and call an expert to refute Henry's testimony deprived him of a substantial defense. *Caballero, supra* at 640-642; *Hoyt, supra* at 537-538. He has not shown that he was prejudiced by counsel's failure to consult with and call an expert. *Caballero, supra* at 640-642.

With respect to his claims of ineffective assistance of counsel, defendant finally asserts that counsel was ineffective for failing to object to evidence of his other bad acts. Pursuant to MRE 404(b), evidence of an individual's crimes, wrongs, or other bad acts is inadmissible to show a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, "the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae," *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979), even when the facts and circumstances include other criminal acts, *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). See also *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). The victim testified that she and defendant would use drugs, provided by defendant, before they engaged in sexual activity. Because the evidence that defendant used drugs and provided drugs to the victim was part of the res gestae, any objection to the evidence that it was improper bad-acts evidence or was irrelevant would have been futile. Counsel is not ineffective for failing to make a futile objection. *Fike, supra* at 182.

However, evidence that defendant was previously arrested on a drug charge and that drugs and drug paraphernalia was found in his motel room was not part of the res gestae. This evidence was not part of the facts and circumstances surrounding the commission of the charged crimes. *Shannon, supra* at 146. Nevertheless, counsel's failure to object to this testimony on the ground that it violated MRE 404(b) did not fall below an objective standard of reasonableness. The evidence of defendant's arrest for a drug charge provided the jury with a more intelligible presentation of the full context of events. *Sholl, supra.* It was defendant's arrest that triggered

the investigation leading to the charges in this case. Moreover, because the victim testified that she and defendant used drugs before engaging in sexual activity, there was evidence that defendant's conduct in providing and consuming drugs was part of a scheme or plan. Other bad-acts evidence is admissible to prove that an individual acted in accordance with a scheme or plan. MRE 404(b). Accordingly, evidence that drugs and drug paraphernalia was found in defendant's hotel room was relevant and was proper MRE 404(b) evidence. Any objection to the challenged evidence would have been futile. Counsel is not ineffective for failing to make a futile objection. *Fike, supra* at 182.

Affirmed, but remand for resentencing. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski